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No. 06-729

IN THE

SUPREME COURT OF THE UNITED STATES

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, and JOEL A. MIELE, SR., Commissioner of Department of Environmental Protection,

Petitioners,

-v.-

CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, LTD., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and ERIN M. CROTTY, Commissioner of the New York State Department of Environmental Conservation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the Second Circuit ("Second Circuit") has held that New York City's ("City's") transfer of drinking water from the Schoharie Reservoir to the Esopus Creek is subject to the National Pollutant Discharge Elimination System ("NPDES") permit program under the Federal Water Pollution Control Act (the "Clean Water Act" or "Act"). In *South Florida Water Management District v. Miccosukee Tribe of Indians*, this Court expressly declined to answer the question of whether the transfer of untreated water from one water body to a second is subject to the NPDES permit program. Since that decision, the United States Environmental Protection Agency ("EPA") has confirmed its longstanding view that such "water transfers" are not covered by the NPDES permit program in an Agency Interpretation, and has issued a Notice of Proposed Rulemaking indicating its intention to adopt a rule to that effect. The Second Circuit ignored EPA's pending proposed rule in the decision from which the City now seeks certiorari.

The question presented, which is of great national importance, is:

> Whether the conclusion of the United States Court of Appeals for the Second Circuit that water transfers are subject to the NPDES permit program is inconsistent with the language and structure of the Clean Water Act.

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PETITION FOR WRIT OF CERTIORARI

Petitioners City of New York, New York City Department of Environmental Protection, and Joel A. Miele, Sr. (collectively "the City") respectfully petition for a writ of certiorari to review the opinion of the United States Court of Appeals for the Second Circuit ("Second Circuit").

OPINIONS BELOW

The opinion of the Second Circuit (App. A1) is reported at 451 F.3d 77. The prior opinion of the court of appeals in this matter (App. A52) is reported at 273 F.3d 481. The opinion of the district court (App., A85) is reported at 244 F. Supp. 2d 41. The district court's partial summary judgment (App. A78) is unreported. The initial decision of the district court (App. A24) and that court's decision on plaintiffs' motion for reconsideration (App., A41) are unreported. The Second Circuit order denying rehearing and rehearing en banc (App. A139) is unreported. The district court's order and amended judgment on remand (App. A129) are unreported.

JURISDICTION

The Second Circuit issued the opinion from which the City seeks certiorari on June 13, 2006. Petitioners' motion for rehearing and rehearing en banc was denied on August 25, 2006. This Court has jurisdiction to review this decision under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The statutory provisions pertinent to this case, portions of the Clean Water Act, parts of 33 U.S.C.

§§ 1251, 1311, 1313, 1314, 1319, 1342, 1361, 1362, and 1370,[1] are set forth at A143 of the Appendix.

STATEMENT OF THE CASE

Transfers of untreated water are essential to the design and operation of public water supply systems as well as to local and regional flood control and water management efforts. Petitioners ask the Court to reverse a decision by the Second Circuit Court of Appeals, which is inconsistent with the language of the Clean Water Act and the federal government's long-established position on water transfers, and threatens the operation of all such systems.

In *South Florida Water Management District v. Miccosukee*, this Court explicitly recognized the importance of this issue and left the resolution "open" on remand in that case. 541 U.S. 95, 109 (2004). Petitioners respectfully urge this Court that the issue is now ripe for the Court's review.

Since Congress enacted the Clean Water Act in 1972, the United States Environmental Protection Agency ("EPA") has made clear that transfers of untreated water, in the context of routine water management activities, do not require federal NPDES permits. *See, e.g., National Wildlife Federation v. Gorsuch,* 693 F.2d 156, 167 (D.C. Cir. 1982) ("EPA's construction was made contemporaneously with the passage of the Act, and has been consistently adhered to since"). Virtually none of the millions of dams, levees, aqueducts, canals, and other structures used by the federal, state, and local governments for ordinary management of water, for public water supply,

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[1] These provisions are also known as §§ 101, 301, 303, 304, 309, 402, 501, 502, and 510 of the Clean Water Act, respectively. We cite throughout to the statute as set forth in the United States Code.

flood control, commerce, and other governmental and public purposes, currently operates pursuant to such a federal permit. Many such water management structures predate the enactment of the Clean Water Act and have been in continuous operation since that time.

The federal government has unequivocally stated that such water transfers are not subject to the NPDES program. In 2003, the United States submitted an amicus brief to this Court supporting reversal of the Eleventh Circuit's decision in *Miccosukee*:

> Because the Act requires NPDES permits only where there is an addition of a pollutant "to navigable waters," the Government's approach would lead to the conclusion that such permits are *not* required when water from one navigable water body is discharged, unaltered, into another navigable water body.

Miccosukee, 541 U.S. at 105-06, describing the Brief for the United States as *Amicus Curiae* Supporting Petitioner ("U.S. Amicus Brief").

Similarly, in 2005, EPA, the agency charged by Congress with administration of the Clean Water Act, issued a memorandum directing its Regional Administrators that the NPDES permit program does not apply to water transfers (Ann Klee & Benjamin Grumbles, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* (Aug. 5, 2005) [hereinafter *Water Transfer Interpretation* or *EPA Interpretation*]. App. A205. EPA noted that the Supreme Court not only left open the question whether water transfers were subject to NPDES permitting, but explicitly noted that EPA had not taken a position on the subject, and "essentially invited the Agency to speak on the broad legal

issue in the first instance."[2] EPA's assessment is based on a thorough and reasoned evaluation of statutory language and structure, legislative history, and case law, including this Court's decision in *Miccosukee* as well as the Second Circuit's October 2001 decision in this case. App. A208-A209 & A220. On June 7, 2006, consistent with the Water Transfer Interpretation, EPA issued a notice of proposed rulemaking indicating its intention to adopt a rule clarifying that water transfers are not subject to the NPDES program. National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32,887 (proposed June 7, 2006) (to be codified at 40 C.F.R. pt. 122). App. A170.

Less than a week later, the Second Circuit issued the decision from which petitioners now seek certiorari, ignoring the proposed rule entirely and according no deference to the views expressed by the federal government, either in its *amicus* brief in *Miccosukee* or in the Water Transfer Interpretation.

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[2] (App., memo at 14.) In *Miccosukee*, this Court noted a claim that EPA had not consistently endorsed the "unitary waters" theory, citing an amicus brief submitted by former EPA Administrator Browner in support of respondents ("Browner Amicus Brief"). The Browner Amicus Brief cites a 1975 opinion of the EPA Office of the General Counsel with dicta concerning hypothetical inter-basin transfers of pollutants. 541 U.S. at 107. But the issue of inter-basin transfers was not raised in any of the seventeen questions before EPA in connection with that opinion. The opinion dealt with numerous questions relating to the applicability of the NPDES provisions to irrigation return flows. *In re Riverside Irrigation Dist.*, 1975 WL 23864 (Off. Gen. Couns., June 27, 1975). In 1977, Congress made such flows exempt from NPDES permits. 33 U.S.C. § 1362(14). EPA adopted regulations to the same effect. 40 CFR § 122.3(f). In addition, the Agency Interpretation explicitly supersedes the 1975 opinion. App. A208-A209.

As explained below, the Second Circuit's holding disrupts basic governmental water management functions nationwide by imposing the rigid legal framework established by Congress for regulating discharges of industrial and municipal wastewater to transfers of untreated water.

A. Basis for Federal Jurisdiction

The District Court had jurisdiction of this case pursuant to 28 U.S.C. § 1331, as a civil action raising questions of federal law, and pursuant to 33 U.S.C. § 1365(a), as a citizen suit alleging a violation of an effluent standard or limitation under the Clean Water Act.

B. Overview of Relevant Statutory Scheme

The Clean Water Act provides that unless a National Pollutant Discharge Elimination System ("NPDES") permit is obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1342. The term "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The issue at the heart of this case is whether, when natural, untreated water is moved from a reservoir created by impounding a stream into a second stream (an inter-basin transfer), a pollutant has been "added" to navigable waters within the meaning of the Act.

As EPA has noted,

> water transfers are unlike the types of discharges that were the primary focus of Congressional attention in 1972. Discharges of pollutants covered by section 402 are subject to "effluent" limitations. Water transfers, however, are not like effluent from

> an industrial, commercial, or municipal operation. Rather than discharge effluent, water transfers release one navigable water into another. There is no indication that Congress intended to subject the navigable waters themselves to effluent limitations.

App. A216-17.

C. New York City's Water Supply and the Shandaken Tunnel

New York City owns and operates a water supply system in upstate New York. The facility at issue here, the Shandaken Tunnel, transfers water from one of the two reservoirs that comprise New York City's Catskill water supply system, the Schoharie, to the other, the Ashokan reservoir. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 484 (2d Cir. 2001). Specifically, the Tunnel moves water from the Schoharie reservoir to the Esopus Creek, the main tributary to the Ashokan. *Id.* New York City's average demand for water is about 1.2 billion gallons per day, of which approximately 16% originates in the Schoharie Reservoir. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 46 (N.D.N.Y. 2003); *see also* Joint Appendix before the Second Circuit, Docket No. 03-7203 ("Second Circuit App.") at A321, 909-12. The Shandaken Tunnel came on line in 1924. *Catskill Mountains*, 244 F. Supp.2d at 46. Aside from the Shandaken Tunnel, there is no other way to move Schoharie water to New York City. *Catskill Mountains*, 273 F.3d at 484.

New York City does not treat water collected in the Schoharie reservoir before diverting it through the Shandaken Tunnel. *Catskill Mountains*, 244 F. Supp. 2d at 46. However, the mountains surrounding the Schoharie

reservoir are characterized by extensive deposits of silts and clays, which are often exposed by erosion, particularly during storms. *Id.* As a result, water in the Schoharie reservoir and released from the Tunnel regularly contains elevated levels of suspended solids, and thus turbidity. *Id.* Based on extensive research and analysis, New York City believes that no matter what reasonable structural and programmatic measures are implemented, the diversions through the Shandaken Tunnel will continue, on a regular basis, to be visibly more turbid than the receiving water, the Esopus Creek.[3]

D. History of this Litigation

The opinion of the Second Circuit from which the City seeks certiorari, *City of New York v. Catskill Mountains Chapter of Trout Unlimited, Inc.*, 451 F.3d 77 (2d Cir. 2006), affirmed an earlier Second Circuit opinion in this case, 273 F.3d 481, holding that the City needs NPDES permit under the Clean Water Act to transfer natural, untreated water from one of its drinking water reservoirs to the main tributary of another of its reservoirs.

Respondents Catskill Mountains Chapter of Trout Unlimited, Inc., Theodore Gordon Flyfishers, Inc., Catskill-Delaware Natural Water Alliance, Inc., Federated Sportsmen's Clubs of Ulster County, Inc., and Riverkeeper Inc. (collectively, "plaintiffs") filed a Clean Water Act

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[3] *See* Affidavit of Michael A. Principe, Ph.D., sworn to April 18, 2002, Second Circuit App. at A915-916 [hereinafter, *Affidavit*]; *see also*, *e.g.*, Direct Testimony of Dr. Principe, Second Circuit App. at A990-63. These statements of Dr. Principe, then-Deputy Commissioner for the NYCDEP Bureau of Water Supply, were made before the conclusion of a four-year study of turbidity in the City's Catskill Water Supply System. The study has confirmed Dr. Principe's expectations. The Phase I and Phase II Final Reports of the Catskill Turbidity Control Study, dated December 31, 2004 and September 30, 2006, respectively, will be made available to this Court upon request.

citizen suit against the City on March 31, 2000, alleging that the City's operation of its Shandaken Tunnel, a key component of its drinking water supply system that has been in operation since 1924, constituted a "discharge of pollutants" within the meaning of the Act. On October 4, 2000, the United States District Court for the Northern District of New York ("District Court") dismissed the action, holding that transfers of untreated water do not constitute discharges of pollutants for purposes of the Act. App. A38-39.

Plaintiffs appealed, and the Second Circuit reversed and remanded. *Catskill Mountains,* 273 F.3d 481. On June 4, 2002, the District Court granted plaintiffs' motion for partial summary judgment on the sole question of the City's liability under the Clean Water Act. App. A83.

Following a trial on the amount of penalties, if any, and the appropriate remedy, the District Court issued an order, dated February 6, 2003, 244 F. Supp. 2d 41, which, as modified by an order dated March 12, 2003, held the City liable for statutory penalties in the amount of $5,749,000. Those penalties, for operating a water supply facility as it had been operated for nearly eighty years, including over thirty years after the adoption of the Clean Water Act, are believed to be the largest Clean Water Act penalties ever assessed against a municipality.[4] The District Court also made respondent the New York State Department of Environmental Conservation ("NYSDEC") a third-party defendant pursuant to the All Writs Act, and directed NYSDEC to make a determination concerning, a

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[4] *City Ordered to Pay $6 Million Penalty for Polluting Water: But Discharge at Esopus Creek Could Have Cost 10 Times More*, 229 N.Y.L.J. 1 (2003).

State Pollutant Discharge Elimination System ("SPDES")[5] permit for the City's Shandaken Tunnel within 18 months. *Catskill Mountains*, 244 F. Supp. 2d at 55.

The City appealed. In the decision from which the City now seeks certiorari, the Second Circuit affirmed in part and remanded for resolution of a minor error in the calculation of penalties. The Second Circuit denied the City's petition for rehearing and rehearing en banc.[6] On remand, the District Court reduced the penalty amount to $5,225,000.[7]

E. Problems Arising from the Application of the NDPES Program to the Shandaken Tunnel

Clean Water Act permits must include effluent limits to "achieve water quality standards . . . including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1). The state water quality standard for discharges of turbid waters in New York is: "no increase that will cause a substantial visible contrast to natural conditions." N.Y. COMP. CODES R. & REGS. tit. 6, § 703.2 (2003). Because it is unlikely that the diversions through the Shandaken Tunnel will ever consistently meet this standard, requiring a NPDES permit for the diversion of water through the Tunnel poses a number of serious problems, affecting not only the public health and welfare, but the environment itself.

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[5] The NPDES program is implemented in New York as the State Pollutant Discharge Elimination System, or "SPDES," program, by NYSDEC.

[6] The denial of that petition is unreported and appears at p. __ of the Appendix.

[7] The District Court Order and Amended Judgment are unreported and appear at p. __ of the Appendix.

First, the City moves water through the Shandaken Tunnel to serve the vital public purpose of providing a safe and adequate water supply. NPDES permits, which were designed for discharges of wastewater,[8] and which require strict compliance with effluent limits, are not compatible with diversions of natural, untreated water such as the flows through the Shandaken Tunnel. The City often needs to make releases through the Shandaken Tunnel notwithstanding naturally occurring elevated turbidity levels that cause a "substantial visible contrast" with the waters in the Esopus Creek. For example, releases may be necessary to maintain an adequate supply of water to meet demand, or to address or prevent a drought. Second Circuit App. at A334; A916. The City is also required, under State law, to transfer water in specified amounts and at specified times, to advance recreational use of the Esopus Creek. N.Y. COMP. CODES R. & REGS. tit. 6, Part 670 (2003).

The transfers through the Shandaken Tunnel, as well as the activities of other municipalities that divert untreated natural water for similarly essential public purposes, including flood control, irrigation, and water supply, are already regulated under federal and state laws and regulations. *See, e.g.*, Surface Water Treatment Rule, 40 C.F.R. § 141.71(b)(2); N.Y. ENVTL. CONSERV. LAW § 15-0801(2), discussed below. The decision of the Second Circuit subjects them to yet another layer of regulation under the ill-suited NPDES permit program, which: is designed for industrial and municipal discharges of waste where treatment facilities are presumed (*see, e.g.*, 33 U.S.C. § 1316(b)); is premised on unwavering adherence to

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[8] *National Wildlife Federation v. Gorsuch*, 693 F.2d at 175 ("Throughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes; it never considered how to regulate facilities such as dams which indirectly cause pollutants to enter navigable upstream water and then convey these polluted waters downstream").

effluent limits (33 U.S.C. §§ 1311(b)(1)(C), 1319(a) and (b)); and imposes harsh criminal penalties and, under strict liability, civil penalties, for violations. 33 U.S.C. 1319(c) and (d). As a result, the City and other operators could be forced not only to reduce or even eliminate these transfers whenever civil or criminal liability may ensue, but also may be enjoined from making the beneficial transfers because of the rigid nature of the NPDES permit scheme. 33 U.S.C. § 1319(b). The health and welfare of the public – and of the nine million citizens who rely on the City's water supply system – may necessarily be affected under these circumstances.

Moreover, in many cases, historic diversions or transfers of natural, untreated water continue to be vital to sustaining a healthy aquatic environment in the receiving water body. For instance, the generally cold water from the Shandaken Tunnel is essential to maintaining the trout fishery in the Esopus Creek, especially during the summer when temperatures in the Creek rise and "natural" flow (without the Tunnel's contribution) is diminished. *See, e.g., Catskill Mountains,* 244 F. Supp. 2d at 50.[9] If the reasoning of the Second Circuit is upheld, operators of water supply or flood control infrastructure may be forced to alter or even eliminate diversions or transfers of water in order to avoid liability. The result in many cases will be a net detriment to ecosystems that have come to depend on such diverted flows. Such a result runs counter to the goals of the Clean Water Act.

The biochemical constituents of distinct, untreated bodies of water are inevitably different from one to another, whether the water bodies are in naturally connected

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[9] Indeed, as noted below, New York State requires the City to release specified volumes of water from the Shandaken Tunnel pursuant to its authority to protect natural resources and recreational use of water.

watersheds or not. Thus, diversions or transfers of untreated water are likely to involve transfers of water containing certain different constituents, and constituents in different concentrations, than they may occur in the receiving waters, such as turbidity in this case or the nutrients at issue in *Miccosukee*. Such incidental movements of the natural constituents of untreated water should not be considered "additions" of pollutants requiring NPDES permits under the Clean Water Act.

F. Regulatory Oversight and Permitting of the New York City Water Supply

DEP has operated the Catskill and Delaware water supply systems under a series of Filtration Avoidance Determinations, or "FADs," issued by the U.S. Environmental Protection Agency ("EPA") pursuant to the Surface Water Treatment Rule (40 C.F.R. Part 141) since January 1993. *See Catskill Mountains,* 244 F. Supp. 2d at 53, note 13) Since EPA's first Filtration Avoidance Determination in January 1993, EPA has imposed, and DEP has satisfied, requirements related to turbidity in the Catskill System, under the federal Safe Drinking Water Act and the Surface Water Treatment Rule. *Id.*

Despite EPA's having known that turbid water is released through the Shandaken Tunnel, and despite EPA's requirement that the City analyze and address turbidity in those releases, EPA has never sought to regulate, and has never regulated, levels of turbidity and suspended solids in the Tunnel releases under the Clean Water Act. *Catskill Mountains*, 244 F. Supp. 2d at 53. Similarly, prior to the Second Circuit's October 22, 2001 decision in this case, NYSDEC, the agency with delegated authority to administer the Act in New York State (*see, e.g.*, N.Y. ENVTL. CONSERV. LAW § 17-0801), never applied the Clean Water Act permitting provisions to the Tunnel transfers. *Id.* Not until the City approached NYSDEC

seeking to obtain a permit for the transfer in response to the Second Circuit's October 22, 2001 decision did permitting the Tunnel discharge become an issue for NYSDEC.

Ultimately, NYSDEC issued a permit, effective September 1, 2006, which provides for a number of specific exemptions from water quality standards to address circumstances where transfers are vital to public water supply or are required by the State to promote a healthy aquatic environment in, and recreational use of, the Esopus. [10] N.Y. State Dep't of Envtl. Conservation, *State Pollution Discharge Elimination System Discharge Permit*, No. NY-0268151, 4-5 (Effective Date Sept. 1, 2006) (hereinafter "*SPDES Permit*"). Although the City believes the exemptions are rational and consistent with the purposes of the Clean Water Act and the vital importance of the Shandaken Tunnel, they are novel in terms of the Act and the historic form of NPDES permits issued in New York State. The same organizations that filed this case against the City have challenged the permit in a New York State court proceeding, claiming that the Clean Water Act mandates strict adherence to the water quality standards at all times, and does not allow the exemptions provided in the permit. Petition, *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, (N.Y. Sup. Ct.) (No. 06-3601) [hereinafter *Catskill Mountains v. Sheehan*].

[10] The SPDES Permit will be made available to this Court upon request.

REASONS FOR GRANTING PETITION

REVIEW IS WARRANTED BECAUSE THE CONCLUSION OF THE SECOND CIRCUIT IS INCONSISTENT WITH THE PURPOSE, LANGUAGE, AND STRUCTURE OF THE CLEAN WATER ACT AND WILL WREAK HAVOC ON TRADITIONAL WATER MANAGEMENT ACROSS THE NATION

This Court should grant review because the Second Circuit's decision misinterprets the plain language of the Clean Water Act, misconstrues this Court's decision in *Miccosukee*,[11] ignores the views of the agency to which Congress granted the authority to interpret the Clean Water Act, and threatens to impair traditional water management functions throughout the nation.

The Shandaken Tunnel moves water for the benefit of nearly half the population of New York State. *Catskill Mountains,* 244 F. Supp. 2d at 46. Because of the concurrent benefit it provides to the trout fishery in the receiving water, the City is required to divert water through the Shandaken Tunnel under New York State law. N.Y. ENVTL. CONSERV. LAW § 15-0805(1); N.Y. COMP. CODES R. & REGS. Tit. 6, Part 670 (2003). The Second Circuit decision threatens these essential allocations of water for public health and safety, for natural resources, and for recreational uses – the very water uses the Clean Water Act

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[11] Indeed, the Second Circuit misquoted this Court's decision, attributing language about whether EPA's position on this issue has been consistent since 1972 to the Court rather than to an *amicus*. *Catskill Mountains,* 451 F.3d at 83, *quoting Miccosukee*, 541 U.S. at 107.

is intended to protect. *See, e.g.*, 33 U.S.C. §§ 1251(a)(2), 1313(c)(2)(A).

The NPDES permit program is designed to ensure adequate removal of pollutants before wastewater is disposed of into the waters of the United States. It is premised on existence of, and the need for, treatment facilities capable of such pollutant removal. *See, e.g.*, 33 U.S.C. §§ 1311(b), 1314(b). In sharp contrast, the Shandaken Tunnel diverts natural water – not for disposal of waste but for public use and habitat protection.

Other than the Second Circuit's decisions in this case, no court has ever considered diversions of drinking water toward water supply consumers, for the purpose of moving such drinking water, to be subject to the NPDES program.[12]

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[12] *Compare Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996) (discharge of water after commercial exploitation); *N. Plains Res. Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155 (9th Cir.), *cert. denied sub nom. Fidelity Exploration and Dev. Co. v. N. Plains Res. Council*, 540 U.S. 967 (2003) (the discharge of groundwater pumped into surface waters, during the process of mining, required a NPDES permit). In contrast to the municipal water management activities at issue in this case, *Dubois* defendant Loon Mountain Recreation Corporation was processing the diverted water through snowmaking equipment and *Northern Plains* defendant Fidelity Exploration and Development Company was extracting groundwater in connection with mining operations. Significantly, both companies had no further use for the water at the completion of their processes, and were discharging it as wastewater. The City, in contrast, transfers water through the Shandaken Tunnel not as wastewater, but for consumption.

The First Circuit found it significant in *Dubois* that the water was "commercially exploited" between the time of its intake into the snowmaking equipment and the time it was released. 102 F.3d at 1297. The commercial exploitation meant that water was removed from a pond and two other sources, then processed in snowmaking equipment, and then released back into the pond. *Id.*

To apply the NPDES program to water transfers could induce water managers to limit important transfers to avoid penalties, or could require a massive, costly, and unnecessary treatment facility at each of the myriad water transfer points across the nation that direct water to areas of need and away from areas in danger of flooding. This Court should grant review in this case to prevent such absurd results.

A. The Second Circuit Decision Is Inconsistent with the Plain Language of the Clean Water Act

The Clean Water Act provides that unless a discharge permit is obtained, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. §§ 1311(a), 1342. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Focusing its attention on a single word in this definition ("addition") rather than looking at the definition as a whole, the Second Circuit concluded that the mere transfer of natural, untreated water requires a discharge permit. As this Court recently found, however, close attention must be paid to the language of the Clean Water Act, "where technical definitions are worked out with great effort in the legislative process." *S.D. Warren v. Me. Board of Environmental Protection*, __ U.S. __, 126 S.Ct. 1843,

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The underlying water discharge in *Northern Plains* is even more distinct from the transfers at issue in this case. In determining that groundwater was a "pollutant" in *Northern Plains*, the Ninth Circuit emphasized that, because defendant was engaged in commercial activity, the groundwater qualified as "industrial waste." 325 F.3d at 1161.

Distinguishing between governmental water management activities and commercial exploitation of water is not only consistent with the goals and policy of the Clean Water Act but is required under the Act. 33 U.S.C. §§ 1251(b) and (g).

1849-50 (2006) (quoting the Act's legislative history, "'[I]t is extremely important to an understanding of [§ 402] to know the definition of the various terms used and a careful reading of the definitions . . . is recommended. Of particular significance [are] the words 'discharge of pollutants'"). H.R. REP. NO. 92-911, at 125 (1972).

A discharge of a pollutant is "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. § 1362(12) (emphasis added). In that definition, the modifier "any" is notably missing only from the term "navigable waters." The term "navigable waters," in turn, is defined as "*the* waters of the United States." 33 U.S.C. § 1362(7) (emphasis added). Read together, these definitions require a permit when there is any addition of any pollutant to the waters of the United States from any point source.[13] As numerous courts have found, a pollutant cannot be "added" once it is already in "the waters of the United States."[14]

In *National Wildlife Federation v. Gorsuch*, the District of Columbia Circuit determined that dam-induced water quality changes are not "addition[s] that trigger the NPDES permit requirement" because no pollutant was physically introduced "into the water from the outside world." 693 F.2d 156, 164, 175 (D.C. Cir. 1982). Once a

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[13] The use of the collective term "waters," like the use of the definite article and the absence of the adjective "any," suggests that an "addition" requiring a permit would be an addition to the system of navigable waters as a whole, rather than the incidental transfer of pollutants from one body of water to another.

[14] This is also the view of the U.S. Government. *Miccosukee*, 541 U.S. at 106 ("The Government contends that the absence of the word 'any' prior to the phrase 'navigable waters' in § 1362(12) signals Congress' understanding that NPDES permits would not be required for pollution caused by the engineered transfer of one 'navigable water' into another").

pollutant already exists in navigable water, there can be no subsequent introduction of that pollutant, even if that water is transferred from one body of navigable water to another. Similarly, in *National Wildlife Federation v. Consumers Power*, the Sixth Circuit held that the release of fish and fish parts from a hydroelectric plant downstream from the source of the intake water did not constitute a "discharge of pollutants" because it simply moved pollutants already in the water. 862 F.2d 580 (6th Cir. 1988). "These cases [*Gorsuch* and *Consumers Power*] examined the CWA as a whole and concluded that it was more consistent with the overall statutory scheme to subject water flow diversions to State nonpoint planning processes rather than the NPDES program." App. A224. Other courts have also recognized the principle that an addition of pollutants to navigable waters does not occur where pollution is merely passed "from one body of navigable water to another." *See, e.g., Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993), *cert. denied* 513 U.S. 873; *United States v. Law*, 979 F.2d 977, 979 (4th Cir. 1992) ("[W]here 'pollutants' exist[] in waters of the United States before contact with these facilities, the mere diversion in the flow of waters [does] not constitute 'additions' of pollutants to water").

This Court made clear in *S.D. Warren v. Maine Board of Environmental Protection* that the "waters of the United States" remain national waters, even when they are moved or manipulated. __ U.S. __, 126 S.Ct. 1843 (2006). In rejecting the notion that when water is impounded, it "loses its status as waters of the United States ... and becomes an addition to waters of the United States when redeposited into the river," this Court explained that one cannot "denationalize national waters by exerting private control over them." *Id.* 126 S.Ct. at 1849 (internal citations omitted).

This reading – known, perhaps unfortunately,[15] as the "unitary waters" approach – is consistent not only with the statutory language but also with how the Clean Water Act has been administered since it was enacted. The focus of the NPDES program has long been to ensure that sewage and industrial waste are treated adequately prior to being discharged or added to the nation's waters. *See, e.g., Gorsuch*, 693 F.2d at 175. *See also Miccosukee*, 541 U.S. at 105.

The Second Circuit erred by ignoring everything but the isolated word "addition" in interpreting the statute:

> We decided that "addition" means the introduction into navigable water from the "outside world," with the outside world being defined as "any place outside the particular water body to which pollutants are introduced."

City of New York, 451 F.3d at 81. There is nothing in the Act to suggest that the relevant recipient of an "addition" is "the particular water body to which pollutants are introduced." On the contrary, the Act refers to an addition "to navigable waters," or to "the waters of the United States."

Similarly, the definition requires that the pollutants be added "from a point source." As explained below, to the extent Congress addressed diversions of water at all, it treated diversions as "nonpoint sources" rather than as "point sources."[16] A "point source" is defined as "any

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[15] We do not argue that the waters of the United States are themselves a single, interconnected entity; rather, the "waters of the United States" form a collective body that constitutes the relevant receiving water for purposes of this definition.

[16] *See* section B., *infra*.

discernible, confined and discrete conveyance, including but not limited to any pipe, . . . through which pollutants are or may be discharged." 33 U.S.C. § 1362(14). While "nonpoint source" is not defined in the Act, EPA has explained that "[the term] is defined by exclusion and includes all water quality problems not subject to § 402." *Gorsuch*, 693 F.2d at 166.

Indeed, it is not at all clear that the constituents at issue in this case are "pollutants" for purposes of the definition of "discharge of a pollutant."

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6). Neither turbidity nor sediments is listed in this definition. The list instead focuses on waste materials that might be disposed of into water, rather than naturally occurring constituents of water being moved for purposes of public health and safety, protection of natural resources, and recreation.[17]

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[17] The definitions of "point source" and "pollutant," integral to the definition of the term "discharge of a pollutant," both circularly use the word "discharge." The context – particularly in the definition of "pollutant," which lists an array of waste materials, suggests the ordinary meaning of the word "discharge," – that is, a casting off or unloading. The phrase "addition of a pollutant" in 33 U.S.C. § 1362(12) should thus also be considered in this context: a pollutant is "added" to the waters of the United States for these purposes only if it is discharged as waste. By focusing exclusively on the word "addition," the Second Circuit overlooked the usage of the word "discharge" throughout these definitions.

By substituting its own reading of the isolated word "addition" for Congress' explanation of when an "addition" constitutes a "discharge of pollutants" – i.e. when the addition is of "any pollutant" from "any point source" to "the waters of the United States" – the Second Circuit ignored the plain language of the statute.[18]

B. The Clean Water Act Anticipates Alternative Mechanisms for Addressing Water Transfers

The Clean Water Act provides that "changes in the movement, flow, or circulation" of navigable waters, including those caused by "flow diversion facilities," are to be addressed as nonpoint sources of pollution. 33 U.S.C. § 1314(f)(2)(F). Facilities that change the flow of water, even if the facility causes a change in the receiving water's quality, are considered nonpoint sources, and should be regulated as non-point sources rather than under the NPDES permit program set forth in 33 U.S.C. § 1342. *See Consumers Power*, 862 F.2d at 588 ("This supports . . . the view that generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under 'nonpoint source' category of pollution") (*citing Gorsuch*, 693 F.2d at 177). *See also* App. A215-16.

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[18] The language elsewhere in the statute makes clear that when Congress felt it appropriate to address particular water bodies, or portions of specific water bodies, it did so explicitly, and did not use the defined term "navigable waters." *See, e.g.*, provisions concerning the identification of specific water bodies or segments not meeting water quality standards, 33 U.S.C. §§ 1313(d)(1)(A) ("Each State shall identify *those waters within its boundaries*...") and (B) ("Each State shall identify *those waters or parts thereof within its boundaries*...") (emphasis added).

This reading is consistent with the legislative history of this provision. The House Committee report on Section 304(f) states:

> The Committee . . . expects the Administrator to be most diligent in gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods for control of pollution from such nonpoint sources as . . . natural and manmade changes in the normal flow of surface and groundwater.

H.R. Rep. No. 92-911 at 109 (1972). Accordingly, "the legislative history of the Act discusses water flow management activities only in the context of the nonpoint source program . . . rather than an area to be regulated under section 402." App. A218.

C. The Second Circuit's Decision Is Inconsistent with the Structure of the Clean Water Act.

The Clean Water Act makes clear that Congress did not intend to interfere with state water allocation. Section 101(g), entitled "Authority of States Over Water," states:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any state.

33 U.S.C. § 1251(g). Similarly, Section 510 of the Act, entitled "State Authority," further affirms Congress' intention that the Clean Water Act NPDES permitting provision not affect allocation of water within a state.

> Except as expressly provided in this chapter, nothing in this chapter shall ... be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters ... of such States.

33 U.S.C. § 1370. EPA concluded that these sections "support the notion that Congress did not intend administration of the CWA to unduly interfere with water resource allocation." *See* App. A214. Similarly, this Court in *Miccosukee* did not limit its inquiry, as the Second Circuit did in this case, to a single word in a single definition, but recognized that the analysis must consider the Act as a whole. Indeed, this Court confirmed in *Miccosukee* that if the ability to transfer water is impaired through the application of the NPDES program, Section 101(g) of the Act would be violated.

> Many of these diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act.

Miccosukee, 541 U.S. at 108.

The NPDES permit program, which was crafted to suit traditional discharges of pollutants from municipal wastewater and industrial sources, is predicated on the existence of a treatment facility that can be operated or modified to remove pollutants in order to meet appropriate permit limits. For this reason, the NPDES program is not appropriate for most transfers of untreated water: treatment facilities neither are nor should be required at water transfer points.

1. New York City's Transfer of Water through the Shandaken Tunnel Is a State Water Allocation

The City's water supply system is operated pursuant to New York State law to provide water to New York City and upstate communities. The creation of the upstate reservoirs was authorized under the Water Supply Act,

> An Act to provide for an additional supply of pure and wholesome water for the city of New York; and for the acquisition of lands or interest therein, and for the construction of the necessary reservoirs, dams, aqueducts, filters, and other appurtenances for that purpose; and for the appointment of a commission with the powers and duties necessary and proper to attain these objects.

1905 N.Y. Laws Ch. 724. Among other things, all plans for the reservoir system were required to be "submitted to and approved by the state water supply commission." *Id.* at § 46. While the State retains certain authority over the City's water supply system, the Water Supply Act represents a delegation of water rights to the City by the State Legislature.

New York State continues to be closely involved in allocation of water in connection with the City's water supply system:

> It is hereby declared to be the policy of this state that the volume and rate of change of volume of releases of water from [reservoirs within the New York City system] should be regulated to protect and enhance the recreational use of waters affected by such releases while ensuring and without impairing an adequate supply of water for power production or for any municipality which uses water from such reservoirs for drinking and other purposes.

N.Y. ENVTL. CONSERV. LAW § 15-0801(2). With respect to the Shandaken Tunnel in particular, "[t]he Commissioner is authorized and directed to promulgate rules and regulations ... for releases from Schoharie reservoir through the Shandaken tunnel." *Id.*, § 15-0805(1).[19]

2. Application of the NPDES Permit Program in this Case Will Impair a State Water Allocation

The City was required to obtain a SPDES permit for transfers from the Shandaken Tunnel as a result of the Second Circuit's decisions in this case, thus subjecting the movement of water within its supply system to additional regulation, beyond that which historically has applied. The permit includes limitations on the level of turbidity and other constituents in water diverted through the Shandaken Tunnel, and thus impedes the City's ability to use the water the State has allocated it for its water supply. *See SPDES*

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[19] NYSDEC's release requirements for the Shandaken Tunnel are set forth at N.Y. COMP. CODES R. & REGS. tit. 6, Part 670.

Permit at 3. As noted above, it is unlikely that the City can significantly reduce the turbidity levels in the Schoharie reservoir;[20] accordingly, it may be that the City can comply with these permit limits only by curtailing flows through the Tunnel, and impairment of the State's water allocation to the City.

The Second Circuit viewed exemptions from the turbidity limits in the SPDES permit that were designed to prevent water shortages, among other things, as a solution to the inherent inconsistency between the allocation of water in the City's water supply system and the NPDES program. *City of New York,* 451 F.3d at 86. The exemptions are not an adequate solution to the underlying conflict with Congress' expressed intention not to interfere with state water allocations. 33 U.S.C. §§ 1251(g) and 1370. First, the plaintiffs in this litigation have challenged the legality of these exemptions in a case currently pending in New York State Supreme Court. Petition in *Catskill Mountains v. Sheehan, supra.* In that case, citing the Clean Water Act and the implementing federal regulations as well as their New York State counterparts, plaintiffs claim that under the Clean Water Act, NYSDEC

> is not authorized to issue a SPDES permit if the permit allows for violations of water quality standards at any time.... [nor may NYSDEC] provide exemptions in a SPDES permit which would, at any time, allow the permitee's discharge to violate applicable water quality standards.

Id. at ¶¶ 44-45. *See also* ¶¶ 33-34. Accordingly, the validity of the exemptions, without which there would be a

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[20] *See Affidavit, supra* note 3 at A915-916 and accompanying text.

devastating effect on the water allocation underlying the City's water supply, is uncertain.

Additionally, NYSDEC has indicated its expectation that the exemptions will be revisited: the permit provides for a review of the exemptions upon completion of the activities required under a Schedule of Compliance required under the permit. *See SPDES Permit* at 6, footnote 7. Given the likelihood that the turbidity in diversions through the Shandaken Tunnel will not be significantly reduced through the activities required under the Schedule of Compliance, the City does not anticipate that its reliance on these exemptions in order to meet the demand of the nine million water consumers it serves will decrease over time. Thus, although the exemptions may temporarily help mitigate the conflict inherent in applying the NPDES permit program to systems of water allocation, they by no means reflect a satisfactory, permanent solution. And in any event, the City should not pay millions of dollars in Clean Water Act penalties for a transfer of drinking water that it was allocated more than eighty years ago.

D. The Second Circuit Should Not Have Ignored EPA's Pending Rulemaking Addressing Water Transfers

EPA's Notice of Proposed Rulemaking, issued less than a week before the Second Circuit made its decision in *Catskill Mountains Chapter of Trout Unlimited, Inc.*, indicates EPA's intention to adopt the Water Transfer Rule. This rule will confirm that water transfers are not subject to the NPDES permitting program. It will thus answer precisely the question that was before the Second Circuit – whether the City needs a NPDES permit to transfer untreated water through the Shandaken Tunnel.

Once the Water Transfer Rule is adopted,[21] the decision of the Second Circuit will directly conflict with an interpretation of the Clean Water Act entitled to *Chevron* deference. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).[22] Indeed, this conflict may arise even before the Rule is adopted, particularly in areas where EPA (rather than delegated state agencies) administers the Act.[23] In its August 5, 2005 Agency Interpretation, EPA instructed its staff that NPDES permits should not be issued for water transfers. App. A205. In the District of Columbia and five states, EPA administers the NPDES program directly, and thus in D.C., non-delegation states, and certain tribal lands, EPA will not issue NPDES permits for water transfers.

There is no question that Congress delegated authority to EPA to make rules implementing the Clean Water Act: "the Administrator [of EPA] is authorized to prescribe such regulations as are necessary to carry out his functions under" the Act. 33 U.S.C. § 1361(a). Instead of deferring to EPA, however, the Second Circuit in *Catskill Mountains Chapter of Trout Unlimited, Inc.* essentially pre-

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[21] EPA has noted its intention to adopt the rule in the spring of 2007. United States' Notice Concerning Action by the Environmental Protection Agency, *Friends of the Everglades v. S. Fla. Water Mgmt. Dist.*, No. 02-CV-80309 (S.D. Fla. Nov. 15, 2006).

[22] The regulation must then be upheld by courts unless it is found to be "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

[23] Congress granted the EPA the authority to administer the NPDES program. In turn, the EPA may grant states the authority to run their own NPDES programs. Although state legislatures may choose to have more stringent regulatory programs than the federal NPDES program, more stringent requirements cannot be developed and imposed on the states by the circuit courts. 33 U.S.C. § 1370(1).

empted EPA's regulatory role. *City of New York*, 451 F.3d at 84-85.

The Second Circuit concluded that this Court's remand for a determination of whether the water bodies there at issue were meaningfully distinct signaled a holding which this Court explicitly did not reach: that there is a "legally significant distinction between inter- and intra-basin transfers." *City of New York*, 451 F.3d at 83. On the contrary, while this Court made clear that intra-basin transfers are not subject to the NPDES program, *Miccosukee*, 541 U.S. 95, 112, this Court "decline[d] to resolve" the issue of inter-basin transfers (and thus whether or not there is a legally significant distinction between inter- and intra-basin transfers), *Id.* at 109, noting that "the Government's 'unitary waters' argument is open to the [South Florida Water Management] District on remand." *Id.* at 112.[24]

For these reasons, the conclusion of the Second Circuit that the transfer of water through the Shandaken Tunnel is subject to the NPDES permit program is based on a misreading of the Clean Water Act. The Second Circuit improperly examined a single term, "addition," in isolation, while ignoring the rest the statute. In failing to read the term "addition" in context, the Second Circuit ignored Congress' clear mandate that diversions of water such as the Shandaken Tunnel are to be addressed as nonpoint sources of pollution, and are not subject to NPDES permitting. Moreover, the decision creates a direct conflict with Congress' instruction that the NPDES permit program shall not supersede, abrogate or impair either the authority

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[24] EPA currently relies on an integrated reading of the Clean Water Act as a whole, including its legislative history, in reaching the result that the United States, as *amicus* in *Miccosukee*, characterized as the unitary waters approach. App. A182-88.

of states to allocate quantities of water, or the rights to quantities of water which have been established by any state. Finally, the decision improperly ignored EPA's interpretation of the statute.

Because of the serious harm that may result from the improper application of the NDPES program to people who rely on water transfers to bring water where needed for public health and safety, agriculture, and aquatic ecosystems, or to redirect water to prevent flooding, review of the decision by this Court is essential the proper application of the Clean Water Act NPDES program.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, held for EPA's adoption of the Water Transfer Rule.

Respectfully submitted,

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